TESTIMONY BEFORE THE

SENATE SPECIAL COMMITTEE ON AGING

ON

ACCESS TO ADEQUATE HEALTH INSURANCE: HOW DOES THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S RECENT RULE AFFECT RETIREE HEALTH

MAY 17, 2004

WASHINGTON, D.C.

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Senator Craig, Senator Breaux, and members of the Special Committee on Aging.

Thank you for this opportunity to appear before the Committee. I wish to speak about the importance of retiree health benefits for *all* retirees, and the need for employers to treat both older and younger retirees equitably under the age discrimination laws.

For many years, AARP has been asking Congress – and many of the other groups and organizations represented at this hearing – to work towards an equitable solution to the age discrimination issues raised for retiree health benefits. An equitable solution is one that recognizes that all retirees, not just young retirees, need the health benefits that employers provide to their retirees. An equitable solution is one that addresses employers' concerns about escalating health care costs and makes it feasible and attractive for them to provide some level of health benefits for all its retirees.

An equitable solution is NOT one that denies benefits to the oldest and often sickest and poorest group of retirees, under the assumption that this will encourage employers to provide retiree health to younger retirees.

Unfortunately, this is the solution the EEOC, and the supporters of its rule, have chosen.

Let us be clear what the EEOC rule says: It exempts employer-provided retiree health benefits from the federal Age Discrimination in Employment Act (ADEA). It explicitly permits employers to discriminate by terminating or reducing the supplemental health benefits they provide to older retirees. Regardless of its impact on younger retirees, this rule will risk millions of older retirees getting substantially fewer health benefits than they currently receive. The EEOC rule will encourage employers who currently provide health benefits to older retirees to consider dropping them.

The importance of retiree health benefits is clear. In the wake of a national debate on how best to *improve* health benefits, including employer-provided benefits, for Medicare-eligible retirees, it surely is not in the "public interest" to encourage employers to eliminate supplemental health benefits for these same people. In fact, the recently enacted Medicare prescription drug law included tens of billions of dollars of direct subsidies to employers to encourage them to maintain these very benefits.

Medicare covers only about half of a typical beneficiary's total health care costs. Medicare beneficiaries must pay out of their own pockets for the many health care services not covered by Medicare as well as for the deductibles, co-pays and co-insurance, and premiums that Medicare requires. Services not covered by Medicare include routine dental, vision and hearing care, long-term care, certain preventive services, and, most importantly, prescription drug benefits.

Even after the Medicare prescription drug benefit takes effect, in 2006, beneficiaries will still be responsible for the premium costs, deductibles, and coinsurance associated with that benefit.

Persons receiving retiree health benefits typically have coverage similar to that of those who are still working. While a retiree's liability for the costs of health services under a retiree health plan varies from plan to plan, most include some drug coverage and caps on their annual out-of-pocket costs. Retirees who do not have access to employer-provided retiree health, or who lose it, must look to the private market. But, there is no assurance that the private market will offer a plan with benefits comparable to those that an employer provides; or that is affordable. Moreover, persons who lose their employer-provided benefits after their initial year of Medicare coverage have no guarantee of acceptance into any plan (unless a Medicare Advantage plan is available). This is, of course, a particular problem for persons who are disabled or otherwise have a pre-existing health condition.

AARP believes the rule is illegal, unsupported by the meager record compiled by the EEOC and, most importantly, bad civil rights and health care policy. (See attached copy of AARP's September 12th comments to the EEOC on the proposed rule).

The rule is illegal because EEOC does not have authority to rewrite the laws that Congress has written. EEOC's authority to issue exemptions under sec. 9 of the ADEA is very limited – as its own regulations make clear. Congress did not – and could not – give EEOC authority to amend the ADEA just because the Commission may now disagree with the policies Congress enacted. The extraordinary and improper reach of the rule is highlighted by the fact that less than six months ago Congress refused to amend the ADEA with language almost identical to this rule.

The rule is also illegal because its purpose is not to protect or expand the rights of older workers and retirees or to otherwise enforce the ADEA. Rather, it is intended to influence the actions of employers with regard to the provision of health care to a select group of retirees. The Commission argues that this is justified by the "public interest."

But, nowhere in the ADEA – or any other law – is EEOC given authority to determine what is good health care policy for the United States. Surely that is a task for the Congress, not an administrative agency whose sole responsibility is to deter employment discrimination. EEOC's lack of expertise in this field is particularly notable when one reads the record it has compiled in an effort to support the rule. No effort was made to determine the wider impact the rule

would have on the persons most affected – Medicare-eligible retirees – or how the recently-enacted Medicare prescription drug law will affect employer conduct.

When determining the "public interest," the EEOC simply ignored the "public" – the tens of thousands of people who filed comments objecting to the rule and the tens of thousands more who opposed similar legislation last fall. Almost 60,000 people filed comments with the EEOC in opposition to the rule. More than 160,000 people contacted the Congress during its debate on the Medicare prescription drug act to object to a similar provision (sec. 631).

Unlike the EEOC, Congress heard the public's voice and deleted that provision from the final law. And, in just the past three weeks, more than 75,000 people have contacted the EEOC and/or their Member of Congress to ask that Congress step in to prevent this rule from taking effect.

The lack of public enthusiasm for the EEOC's rule is pervasive. Earlier this month, AARP fielded a nationally representative survey of 3,142 people aged 50 and over (1,806 were AARP members) asking questions about the EEOC rule and retiree health benefits ("Perceptions of the EEOC Ruling Among the 50+ Population"). Over seven in ten (73%) people aged 50 and over disagree with the EEOC's ruling, including strong majorities of both AARP members (74%) and non-members (71%). We found this sentiment prevails among all the age and

demographic segments represented in the survey, and among all political affiliations and income levels.

In fact, younger AARP members, between ages 50-65, are slightly more likely to strongly disagree with the ruling – and this is the group EEOC says it is helping!

The survey included arguments both for and against the EEOC's ruling. Less than one-quarter (24%) of the 50+ population agree with argument that the "employers who provide retiree health benefits should be able to save money by offering more generous benefits only to younger retirees not eligible for Medicare." Conversely, almost eight in 10 (78%) agree that "it is unfair and discriminatory for employers to reduce or eliminate health benefits for its retirees aged 65 and older while offering these benefits to its younger retirees.

Seventy-nine percent said that "Congress should take steps to insure that companies that provide retiree benefits do not decide based on age who gets these benefits."

The record is also devoid of anything that would lead one to conclude the rule will have the desired, or required, effects. It certainly won't further the non-discrimination goals of the ADEA. It certainly won't protect the retiree health benefits of people as they age. There is no empirical evidence that employers

will be encouraged to provide retiree health benefits to any retirees if the rule takes effect. Even those writing in support of the rule make no promises to provide, or continue to provide, retiree health benefits to younger retirees. Indeed, had the Commission bothered to look, it would have found ample evidence to suggest that eliminating retiree health benefits for older retirees is often just one step towards eliminating it for all retirees. This is exactly what happened to an AARP member in Louisiana who worked for a predecessor company of International Minerals and Chemicals Global corporation. As of January 1, 2004, IMC Global ceased providing retiree health benefits to retirees above age 65. And, any employee under age 50 as of April 2003 will not get retiree health benefits upon retirement.

The EEOC says that this rule protects everyone's health benefits. But, it is clear that this rule does not protect the benefits of older retirees. More than 12 million Medicare beneficiaries currently receive some form of health benefits from their former employers. The EEOC did not try to assess how many people will lose their employer-provided supplemental benefits, where or whether they will find alternative benefits, or how they will afford those benefits. The record has no assessment of how the insurance industry will adapt, if at all, to the needs of this potential influx of private beneficiaries. Nor does the record address what will happen to the great number of older retirees who are disabled or have pre-existing medical conditions that may disqualify them from any – or any affordable – private Medigap policy.

Perhaps the most glaring omission in the record is EEOC's failure to assess how the improvements made to Medicare – including the tens of billions of dollars of direct subsidies to employers – made by the Medicare prescription drug law will affect employer practices. In fact, the new law benefits employers regardless of whether they qualify for the financial subsidies provided by Congress. The addition of a prescription drug benefit to Medicare correspondingly, and substantially, reduces an employer's cost for a supplemental health benefit for older retirees.

Congress was seeking ways to KEEP employers in the retiree health system, not ways to make it easier for them to exit that system. The EEOC rule obviously does the latter.

The lack of evidence in the record is especially troubling because this rule represents an abrupt about-face from the EEOC's position on the same issue only four years ago. In its brief to the 3rd Circuit in the *Erie County* case, the Commission stated:

> Health insurance benefits can be a costly employee benefit. Employers should not have their hands tied in their efforts to maximize the benefits for all employees, current and former. The answer to this conundrum, however, is not to arbitrarily exclude a group of individuals from the protection of the statute. The answer is for the employer either to rely upon distinctions that are not age-based or to structure any age-based distinctions in a manner that comports with the ADEA . . .

There is hardly any discussion in the record of either the real reasons employers have been leaving the retiree health system or the real costs associated with providing these benefits to older retirees – and then eliminating them.

The paucity of support for the EEOC's position is highlighted by even a cursory look at the recent history in this area. It is clear that the decade-long decline in retiree health benefits has nothing whatsoever to do with the ADEA and its requirement that an employer provide these benefits in a fair and non-discriminatory manner. Retiree health benefits were declining for many years prior to the *Erie County* decision in 2000, for reasons having nothing to do with the ADEA.

The dramatic decrease in retiree health can be traced back to the early 1990's. The beginnings of the extraordinary increase in the cost of all health care, the restructuring of the private sector, the first wave of baby boomer retirements and, perhaps most important, the decision by the Financial Accounting Standards Board in 1992 to require employers to account for these future expenses as present liabilities, are all at fault. Over the past 15 years, there have been similar declines in all types of benefits, including a shift from defined benefit to less-costly, and less valuable, defined contribution pension plans and a shift of costs for employee health care from the employer to the beneficiaries.

Another fact ignored by the EEOC is that Medicare-eligible retirees are significantly less expensive to insure than younger retirees – sometimes the cost is only 25% of the cost for a younger retiree – because employers are already permitted to "coordinate" their retiree health benefit plans with Medicare. In the guidance it issued in the wake of its success in the *Erie County* case – and subsequently withdrew in favor of this rule – the EEOC noted that "employers may take the availability of Medicare benefits into account in structuring their health benefits to older retirees. As a result, employers may deduct from the health benefits they provide any Medicare benefits for which those retirees are eligible." In other words, employers who provide retiree health benefits to older retirees do not have to duplicate Medicare's benefits, but merely supplement them so that older retirees ultimately have same overall level of benefits as the younger retirees, even though the source of their benefits is a combination of the employer and Medicare. More than 75% of the employers who provide retiree health benefits, provide them to their Medicare eligible retirees in this manner. But, to the extent that employers perceive technical problems related to insuring that these Medicare supplemental plans comply with the ADEA, AARP is pleased to work on regulations, or legislation, that further clarifiy the legitimacy of such "wrap-around" plans.

AARP recognizes that there are critical issues surrounding retiree health benefits. As noted earlier, we have urged the Congress to look at these issues. In the wake of the *Erie County* decision, it has become clear that employers need

more guidance as to what they may and may not do under the age laws. For this reasons, AARP was especially disappointed that the EEOC withdrew its guidance that clarified that, when an employer provides retiree health benefits for Medicare eligible retirees, the employer may incorporate Medicare's benefits into its retiree health plan (as discussed above).

In issuing the rule, EEOC Chair Dominguez indicated her willingness to discuss with AARP a better solution to the issue than simply denying these benefits to the oldest and often the sickest of beneficiaries. We are pleased to participate in these discussions. But, please be assured that should these efforts not be successful, AARP will not hesitate to take other steps to protect its members' interests – and benefits – including asking the courts to prevent the rule from taking effect.

We urge you once again to address this issue in a responsible manner that protects the rights of older persons and recognizes the importance of retiree health benefits for both younger and older retirees.

Thank you.

September 12, 2003

Francis Hart, Executive Officer
Office of the Executive Secretariat
Equal Employment Opportunity Commission
1801 L. Street, N.W.
Washington, D.C. 20507 BY MESSENGER

Re: 68 Fed. Reg. 41542 (July 14, 2003)
Age Discrimination in Employment Act Rulemaking

Dear Ms. Hart:

AARP appreciates this opportunity to comment on the proposed exemption under the Age Discrimination in Employment Act ("ADEA"), published by the Equal Employment Opportunity Commission on July 14, 2003 (68 Fed. Reg. 41542). AARP would like to reserve the right to supplement these comments with a more detailed analysis of the policy and law governing the coordination of retiree health benefits and the ADEA.

AARP files these comments in opposition to the EEOC's proposal to exempt employer-provided retiree health benefits from the coverage of the Age Discrimination in Employment Act of 1967 (ADEA). In proposing this exemption, the Commission abandons its primary obligation to protect the rights of workers to non-discriminatory treatment by employers. The apparent purpose of the exemption is not to protect or expand the rights of older workers and retirees or to otherwise enforce the ADEA. Rather, it is intended to influence the actions of employers with regard to the provision of health care to a select group of retirees. The Commission attempts to do this by permitting employers to overtly discriminate against older retirees in hopes that this will encourage employers to

provide and improve health benefits offered to younger retirees. The Commission argues that this is justified by the "public interest."

It is astonishing that, in the midst of a national debate on how best to *improve* health benefits, including employer-provided benefits, for Medicare-eligible retirees, the EEOC believes that it is in the "public interest" to facilitate elimination of all employer-provided benefits for this same group of beneficiaries. Protecting retiree health benefits for both younger and older retirees is of critical importance to AARP and its members, but this rule will instead lead to fewer health benefits – and in particular reduced coverage for prescription drugs -- for retirees age 65 and over.

Older retirees rely upon their employer-provided retirement health benefit for access to benefits not covered by Medicare, most notably prescription drugs and protection from large out-of-pocket expenses, and crucial assistance with premium expenses. Employer group coverage affords many retirees health benefits that are otherwise unavailable to or not affordable for them. Many have no other access to a supplemental plan that will provide adequate and affordable prescription drug benefits or coverage for out-of-pocket expenses.

The President and Congress have made prescription drug coverage for the Medicare-eligible population one of the top domestic priorities for the year. Clearly, it is their view – and AARP's view – that the public interest is best served by maintaining and enhancing retiree health coverage for Medicare beneficiaries, particularly coverage for prescription drugs. The EEOC's proposal instead gives employers a green light to eliminate such coverage for the Medicare-eligible population. The tens of thousands of AARP members who have already weighed in with Congress and the EEOC on this very issue have sent a clear message as to where the public interest lies.

AARP believes that the proposed regulation (1) exceeds the authority of the EEOC to issue regulations under the ADEA generally, ADEA §9 (29 USC §628) specifically, and the Administrative Procedure Act; (2) contravenes the language, legislative history and purpose of the ADEA; and (3) represents an arbitrary, capricious and unjustified exercise of the EEOC's authority to issue regulations under the ADEA and change its policy and practices with regard to discrimination in employer-provided retiree health benefits.

Nothing in the ADEA – or any of the Commission's relevant enabling statutes – authorizes the EEOC to either consider or attempt to influence the manner in which employers provide retiree health benefits other than to prohibit discrimination. The EEOC's rulemaking authority under ADEA §9 to issue "exemptions [from the ADEA] that are in the public interest" is not a blanket grant of authority to rewrite the law; nor may the EEOC define "the public interest" without reference to the language and purposes of the ADEA. The Commission's own regulations highlight the limited nature of its authority to issue exemptions:

> The authority conferred on the Commission by section 9 …will be exercised with *caution and due regard for the remedial purpose of the statute* to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment. Administrative action *consistent with this statutory* purpose may be taken…when found necessary and proper in *the public interest in accordance with the statutory standards*. . . . . [A] reasonable exemption from the Act's provisions will be granted only if…*a strong and affirmative showing* has been made that such exemption is in fact necessary and proper in the public interest.[1]

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[1] The Commission's current regulation setting standards for the use of ADEA §9 is substantially similar to the regulation first issued by the Department of Labor in 1969. See 29 C.F.R. §850.16 (34 Fed. Reg. 19193; Dec. 4, 1969).

The exemption authority under Section 9 has only been exercised once, and never by the Commission. When the Department of Labor issued regulations in 1969, it created an exemption for activities carried out by the public employment services of the states under the Manpower Development and Training Act of 1962 and the Economic Opportunity Act of 1964. See 29 C.F.R. §850.16(a).

29 C.F.R. § 1627.15(b) (*emphasis added*).

The case law establishes a similar analysis: the touchstones for evaluating agency action are both the express delegation of authority contained in the enabling statute (the ADEA) and the applicable standards for rulemaking contained in the Administrative Procedure Act. "If the intent of Congress is clear, that is the end of the matter . . .the agency must give effect to the unambiguously expressed intent of Congress." *Chevron USA v. NRDC, Inc.,* 467 US 837, 842-43 (1984). If Congress "has not directly addressed the precise question . . . the agency's interpretation of the statute is entitled to deference so long as it is 'reasonable' and not otherwise 'arbitrary, capricious or manifestly contrary to the statute.'" *Motion Picture Assn. of America v. FCC,* 309 F.3d 801 (DC Cir. 2002), *quoting Chevron.*

The proposed exemption directly contravenes the language of the ADEA, as amended by the Older Workers' Benefit Protection Act (OWBPA), and the entire body of regulatory history accompanying the statute. Neither the ADEA (as amended by the OWBPA) nor its legislative history permit or contemplate exemptions of the type proposed by the EEOC in this NPRM. Indeed, the statute specifically prohibits it. Therefore, the proposed exemption fails the *Chevron* test.

The extraordinarily detailed nature of the 1990 amendments leaves no room for the EEOC, or the courts, to argue that the language of the statute is not clear, explicit and *exclusive* with regard to the treatment of employee benefits under the ADEA. The OWBPA establishes:

- **A general rule** (non-discrimination in all employee benefits),
- **A specific defense** to a claim of discrimination in benefits (the equal benefit or equal cost defense), and
- **Limited exemptions to the general rule** for very specific practices enumerated in the law that otherwise would not satisfy the equal benefit or

equal cost defense.[2] Even these exemptions share a specific characteristic of equity: similarly situated older and younger retirees receive the same amount of monthly benefit, even if derived from different sources (government, pension plan, or employer's funds). This equity is not present in the exemption proposed by the EEOC, which would allow employers to provide younger retirees with health benefits far more generous than those provided in Medicare, while denying all less expensive supplemental benefits to older retirees. [3]

No other defenses or exceptions are contemplated or permitted. As the Supreme Court held in *Chevron*, when Congress has spoken to the precise

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[2] Congress exempted very few employee benefits from the coverage of the "equal benefit or equal cost" rule established in ADEA §4(f)(2), 29 USC §623(f)(2); those exemptions are specified in the legislation. For example, the practice of providing retirees with "bridge" payments to Social Security that terminated upon receipt of Social Security benefits was specifically permitted, with limitations.

In contrast, the (according to the EEOC, common) practice of providing retirees with a health insurance "bridge" to Medicare was not included in the list of exceptions. Instead, it was made clear that employers need not duplicate Medicare benefits in their retiree health plans for Medicare eligible retirees. Thus, the OWBPA codified regulations that specifically provided for different treatment of retiree health benefits by allowing employers to reduce their retiree health expenses for retirees over age 65 through integration of Medicare. 29 U.S.C. § 623(f)(2)(B).

It is worth noting that, as a practical matter, this "integration" operates in the same manner as the Social Security "bridge" payment. If an employer provides younger retirees a health plan that is no better than Medicare, its integration with Medicare will be 100% and the benefit will cease at age 65.

[3] The only other "exception" is found in §4(l)(2)(D), permitting an offset against severance for retiree health benefits received by pension eligible employees at the time of a layoff or plant closing. This last provision highlights the fact that Congress did not ignore the existence of retiree health benefits when passing the ADEA, but rather chose not to include it in the list of exemptions noted above. Indeed, the importance that Congress placed upon the availability of employer provided retiree health benefits is highlighted by the remedy it provides for violations by an employer who subsequently reduces or eliminates the retiree health benefit: not damages but specific performance. *See Erie County Retirees Assoc.,* EEOC *amicus* brief, at p. 28. ("If anything, the fact that Congress addressed the issue of retiree health benefits and did so only in the context of a statutory offset for severance benefits strongly supports the view that Congress did not intend . . . to exempt discrimination in retiree health benefits from the reach of the statute.")

question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, *supra*, 467 US at 843.

Since the EEOC cannot rely upon the language of the ADEA and the regulations codified by the OWBPA, its legal justification rests upon the slim reed of a Statement of Managers that was included in the Congressional Record on the occasion of passage of the OWBPA in 1990. Unfortunately, the EEOC's strained interpretation[4] inaccurately forces the Statement of Managers into conflict with the language of the statute and its committee reports, thereby discounting its value as guidance.

The flaws in the EEOC's current analysis are highlighted in the EEOC's own (successful) brief to the Third Circuit in *Erie County Retirees Assoc.* v. *County of Erie, PA, et al*., 220 F.3d 193 (3d Cir. 2000). In its brief, the EEOC not only rejects the interpretation now proffered by the EEOC ("I[]t is clear from the legislative record that the consensus for adopting an explicit limitation on [retiree health] coverage did not exist."[5]); but emphasizes that such an interpretation must give way to the overwhelming weight of contradictory language in the contemporaneous Committee reports and the language of the ADEA itself:

> The issue . . . is not which side of the legislative debate had the greater success in lining the legislative record with statements favoring its position. The issue is what language actually ended up in the text of the ADEA. The legislative history . . . cannot trump the broader view of coverage that emerges from the text of the ADEA's prohibitory provision, as originally enacted, and from the broad prohibition against discrimination in "all" employee benefits.

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[4] Nowhere does the Statement of Managers contemplate that employers are permitted to *eliminate* retiree health benefits solely for older retirees, as opposed to reducing them to reflect incorporation of Medicare benefits into the employer's retiree health plan.

[5] *Erie County Retirees Assoc.* v. *County of Erie, PA, et al*., 220 F.3d 193 (3d Cir. 2000), Brief of the EEOC as *amicus curie* in support of the Appellants, at 28 (January 10, 2000).

Erie County Retirees Assoc. v. *County of Erie, PA, et al*., 220 F.3d 193 (3d Cir. 2000), brief of the EEOC as *amicus curie* in support of the Appellants, at 25-26 (January 10, 2000).

As the EEOC pointed out, "there is a plausible reading this legislative history [the Statement of Managers] that is compatible with a broader view of statutory coverage. *Id*., at 27. *See* note 4, *supra*.

Even if one could read the Statement of Managers in the manner most recently urged by the EEOC, this one statement cannot override the clearly expressed will and intent of Congress found in both the language of the statute and in the reports issued by the Committees of jurisdiction.[6] "Without a textual foundation, [the Statement of Managers] . . . is precisely the type of free-floating legislative history that should be viewed with skepticism. *Blanchard v. Bergeron*, 489 US 87, 97-100(1989) (Scalia J., concurring)."

The proposed rule also fails the "public interest" standard the EEOC must apply to it. The EEOC has failed to show that *any* public interest is served by the proposed exemption: it is unable to cite any authority or data in support of its contention that eliminating employers' obligations to provide retiree health in a nondiscriminatory manner will encourage employers to continue to offer retiree health benefits to younger retirees. The record is also devoid of any discussion of the harm older retirees will suffer or how that harm will be offset by fulfillment of the ADEA's overall goals of encouraging employment of older workers and eliminating arbitrary age discrimination. Less than four years ago, the Commission came to precisely the opposite conclusion with regard to the identical question:

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[6] The problem with this history is that it has no anchor in the text of the statute. Are the Managers saying that retirement health benefits, in general, are excluded from the reach of the statute? If so, where is that exclusion found in the text of the statute? Are the managers saying that employers are categorically permitted to rely upon Medicare eligibility in making distinctions in the provision of retirement health benefits? If so where is that categorical defense found in the text of the statute?

Erie County Retirees Assoc., EEOC *amicus* brief, at 22-23

> Health insurance benefits can be a costly employee benefit. Employers should not have their hands tied in their efforts to maximize the benefits for all employees, current and former. The answer to this conundrum, however, is not to arbitrarily exclude a group of individuals from the protection of the statute. The answer is for the employer either to rely upon distinctions that are not age-based or to structure any age-based distinctions in a manner that comports with the ADEA . . .

Erie County Retirees Assoc. EEOC *amicus* brief at 30.

The major component of the record – the EEOC's "study" of the relationship of the ADEA and employer's retiree health practices and its subsequent analysis and conclusions – is both inadequate and flawed in its analysis and conclusions.

Some of the most glaring flaws, inaccuracies and omissions in both the study and the record include the following:

1. **An assessment of the harm and related costs – economic, medical, and otherwise -- that would be suffered by older retirees who lose or are denied access to employer provided retiree health benefits.** The Commission does not even provide an estimate of the *number* of retirees who will be affected, much less an estimate of their relative, individual abilities to afford to purchase replacement policies.

   Although employer-provided Medicare supplements do not shield retirees from all out-of-pocket costs, they provide substantial relief for these and other expenses and improve access to health care. The type of supplement a Medicare beneficiary has can make a big difference in that beneficiary's access to health care and in limiting his/her out-of-pocket costs. Loss of a supplement or a substantial decrease in the benefits or employer contribution can have a dramatic negative effect. Loss of supplemental coverage usually means the loss of prescription drug coverage and increased liability for out-of-pocket expenses, supplemental premiums and other health related spending. It is not uncommon for persons.losing employer-provided retiree coverage to face a 40% increase

in out-of-pocket health spending, primarily due to the increased premium expenses if they purchase Medigap individually. MedPac, *Report to the Congress: Variation and Innovation in Medicare . . . June 2003*, at pp. 21-24.

2. **The availability, accessibility and costs of alternative policies to complement Medicare for older (age 65+) retirees; distinctions among states in such policies; or a comparative analysis of employer-sponsored plans vs. individually purchased plans.** Retirees who lose employer-provided coverage may not have access to the same level or type of benefits when they seek individual coverage. Availability of different plans is highly dependent upon geography, economic forces and state regulation. For example, Medicare Managed Care supplements Medicare for about 11% of the Medicare population. But, this option is not available in all geographic areas, especially rural areas. And, many plans offer at best a limited prescription drug benefit and allow the retiree to use only a limited network of providers and impose restrictive plan rules for access to specialist care.

In addition there is no guarantee of access to prescription drug benefits (the federal guarantee issue protections only guarantees access to plans that do not include drug benefits).

3. **An assessment of the impact the proposal may have on the Medicare system (and on the states).** For example, will the number of persons participating in Part B increase? Decrease? If Congress establishes a new "Part D" to provide prescription drug benefits, what impact will eliminating employer-provided benefits have upon the newly amended Medicare system?

4. **An assessment of the impact of the proposal on the practices and policies of insurers.** E.g., will insurers offer prescription drug coverage

even in areas where it is now scarce? How will individual premium costs be affected if employer-provided plans are no longer a common benefit?

5. **An analysis of the common and available mechanisms now used by employers to value and expense retiree health benefits.** This is, perhaps, the most willful error in the record. The EEOC contends that it is "impracticable" for employers to accurately expense and value retiree health benefits as required to satisfy the equal benefit or equal cost rule. Not only is the EEOC incorrect in this contention -- indeed, the ADEA itself contains a formula for valuing the benefits and costs associated with employer-provided retiree health benefits[7] – but it failed to consider either that the equal benefit or equal cost rule is rarely if ever invoked with regard to retiree health -- retiree health expenses for older retirees are invariably less than for younger retirees due to the ability of an employer to incorporate Medicare into its plan, or the wide availability and use of methods for doing precisely these calculations.

   In response to the issuance of FAS 106, there has been developed various strategies for private employers to use in order to accurately account for these benefits. *See* 27 EMPLOYEE BENEFITS JOURNAL, *Retiree Health Coverage* (September 2002) (suggestions and methodologies for analyzing statistical, demographic, premium and claims data); CPA JOURNAL ONLINE, J. Johnson, *OPEBs: FASB prescribes strong medicine* (July 1992) (explaining how to implement the new accounting standard), at http://www.luca.com/cpajournal/old/12826661.htm. The federal government has adopted the same requirement for accounting for these postemployment benefits.[8]

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[7] Section §4(l)(2)(D) (*see* n. 3, *supra*) establishes two formulas (one for pre-65 retirees; one for 65+ retirees) for use by employers to calculate the value of retiree health benefits for purposes of offsetting the value of these benefits against a severance benefit.

[8] In 1997, the Office of Personnel Management issued a FINANCIAL MANAGEMENT LETTER: COST

The Academy of Actuaries' correspondence with the EEOC outlines a variety of issues related to valuing retiree health benefits. It notes that employers routinely estimate per capita costs for FAS 106 financial reporting purposes and that composite per capita costs are allowed for ease of computation. *See* Letter, John J. Schubert, American Academy of Actuaries, to David Frank, EEOC Legal Counsel, October 16, 2002; *see also Outline of Possible Methods for Addressing the Erie County Ruling*, prepared by American Academy of Actuaries' EEOC-ADEA & Retiree Health Workgroup (April 2002).[9]

Without endorsing any of these proposals, AARP suggests that the Commission could have explored whether use of similar alternative measures would have satisfied the requirements of the ADEA and imposed less harm upon older retirees. The accounting and actuarial professions have dealt with new and difficult valuations before and have managed to meet their professional obligations to their clients in a timely and expert manner. This is no different. The EEOC's assertion that such valuations are impossible is just wrong.

6. **A complete lack of data or information – other than anecdotal evidence in the form of employer statements – to support the contention that employers really will provide and/or maintain retiree health benefits at high levels for younger retirees if permitted to discriminate against retirees age 65 and older.**

FACTORS FOR PENSIONS AND OTHER RETIREMENT BENEFITS (No. F-97-08 October 23, 1997) setting forth cost factors and a methodology for calculating the cost of pensions and other retirement benefits.

[9] *See also* Letter, American Academy of Actuaries (AAA) to Governmental Accounting Standards Board (GASB) (May 16, 2003), concerning accounting and financial reporting by employers for other postemployment benefits (OPEB). The AAA sets forth the actuarial considerations related to the effects of aging on the OPEB valuation. The letter also sets forth the process that ensued between AAA representatives and the GASB to develop alternative estimation methods for valuing these benefits.

This is by no means an exhaustive list. And, even a cursory analysis of the literature included in the record compiled by the Commission disproves its contention that the costs of retiree health benefits for Medicare eligible retirees, as required by the ADEA in the wake of *Erie County*, has been the cause of the precipitous drop in employer participation in the retiree health system. It is abundantly clear that employers' willingness to continue to offer retiree health to *any* retirees was declining well before 2000, as a result of the issuance of FAS 106 in the early 1990's and the dramatic increases in health care costs, especially for prescription drugs. *Erie County* is nothing more than a red herring now used by the EEOC to allow employers to save money by eliminating substantial portions of a benefit they were already scaling back prior to the case even being filed. Unfortunately, and illegally, this money is being saved at the expense of the rights and benefits to which older retirees are entitled.

Moreover, the fact that the record must focus on health care issues in order to adequately support the proposed exemption underscores the distance that the Commission has strayed from its statutory boundaries. The Commission's failure to address those issues, despite its "determination" that this rule will "encourage" employers to continue providing retiree health benefits, is a reflection of the fact it has neither the expertise nor the authority to meddle in the establishment of health care policy for the United States.

Even assuming the EEOC has the authority from Congress to make policy in the health care arena – an assumption that AARP vigorously disputes – the need for an adequate record is heightened by the fact that this proposal represents a complete about-face in the Commission's policy, both in regulations and litigation. "[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Bureau Mfrs. Assn. v. State Farm Mutual*, 463 US 29, 43 (1983). Moreover, more than 30 years of consistent interpretation and enforcement of the equal benefit or equal cost rule constitutes

a “settled course of behavior [that] embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. . . . There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.” *Id.,* at 42-43.

The proposed exemption represents what is, at best an arbitrary exercise of the Commission’s authority to issue regulations that are unsupported by either the law or the rulemaking record. At worst, it will wreak significant harm upon the very group of people the Commission is charged with protecting. The only clear beneficiaries will be employers who will receive not only an unanticipated financial windfall, but will be able to use this regulation in private lawsuits as a defense to liability for violating the ADEA. In contrast, many thousands of retirees will be harmed by the loss of their retiree health benefits as they age and will be unable to find, or to afford, an adequate replacement. Far from protecting the rights of older workers - which is a primary job of the EEOC - the proposed regulation will diminish those rights and strand thousands of retirees without adequate health insurance.

The proposed regulation should be withdrawn and the EEOC’s earlier guidance (repealed on August 21, 2001) should be reinstated.

Sincerely,

David Certner
Director, Federal Affairs